

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD L. DAILEY,	§	
	§	No. 331, 2009
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0210012813
Appellee.	§	

Submitted: July 16, 2009
Decided: October 13, 2009

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

ORDER

This 13th day of October 2009, upon consideration of the appellant’s opening brief and the appellee’s motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The appellant, Donald L. Dailey, filed this appeal from the Superior Court’s May 13, 2009 denial of his third motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). The appellee, State of Delaware, has filed a motion to affirm on the ground that it is manifest on the face of Dailey’s opening brief that the appeal is without merit.¹ We agree and affirm.

¹ Del. Supr. Ct. R. 25(a).

(2) Dailey was indicted in January 2003 on multiple charges of rape and conspiracy. In August 2003, Dailey pled no contest to three counts of Rape in the Third Degree. The Superior Court sentenced Dailey to thirty-five years at Level V suspended after fourteen years for twenty-one years at decreasing levels of supervision. Dailey challenged the sentence on direct appeal. The Court rejected Dailey's claims and affirmed.²

(3) Dailey filed his first motion for postconviction relief in 2005. The Superior Court denied relief on the basis that Dailey's allegations were based upon "information [he knew] at the time the guilty plea was entered."³

(4) Dailey filed his second motion for postconviction relief in 2006. Dailey repeated claims that he had raised on appeal and in his first postconviction motion. The Superior Court denied the second postconviction motion as procedurally barred pursuant to various subsections of Rule 61(i).⁴ On appeal, this Court affirmed.⁵

(5) In May 2009, Dailey again moved for postconviction relief. Dailey sought relief on the basis of *Allen v. State*, a 2009 decision wherein we clarified the law regarding jury instructions for accomplice liability.⁶ Dailey also argued that he

² *Dailey v. State*, 2004 WL 439855 (Del. Supr.).

³ *In re Dailey*, 2005 WL 1950800 (Del. Super.).

⁴ *In re Dailey*, 2006 WL 2333914 (Del. Super.).

⁵ *Dailey v. State*, 2007 WL 328831 (Del. Supr.).

⁶ *Allen v. State*, 970 A.2d 203 (Del. 2009).

was entitled to an evidentiary hearing under title 11, section 3507 of the Delaware Code to determine the voluntariness of victim pretrial statements.⁷ Third, Dailey claimed that the judge, when imposing sentence, relied on victim impact statements that were not disclosed to Dailey prior to sentencing.

(6) By order dated May 13, 2009, the Superior Court summarily denied Dailey's motion as untimely pursuant to Rule 61(i)(1), repetitive pursuant to Rule 61(i)(2), procedurally defaulted pursuant to Rule 61(i)(3), and formerly adjudicated pursuant to Rule 61(i)(4), all without exception.⁸ This appeal followed.

(7) After careful consideration of the opening brief and the motion to affirm, it is clear that the Superior Court appropriately barred Dailey's third postconviction motion as untimely, repetitive, procedurally defaulted and formerly adjudicated. Dailey's third postconviction motion, filed more than six years after his convictions became final, is barred unless he can assert a newly recognized retroactively applicable right,⁹ reconsideration in the interest of justice,¹⁰ or a miscarriage of justice because of a constitutional violation.¹¹ Dailey can do none of those things.

⁷ See Del. Code Ann. tit. 11, § 3507 (2007) (permitting the introduction of a witness' voluntary, out-of-court prior statement as substantive evidence in the case so long as the witness is "present and subject to cross-examination").

⁸ *State v. Dailey*, 2009 WL 2219265 (Del. Super.).

⁹ Del. Super. Ct. Crim. R. 61(i)(1).

¹⁰ Del. Super. Ct. Crim. R. 61(i)(4).

¹¹ Del. Super. Ct. Crim. R. 61(i)(5).

(8) Neither the *Allen* decision, which concerns jury instructions, nor Dailey's section 3507 claim concerning the voluntariness of victim pretrial statements, have any apparent applicability in Dailey's case, which did not involve a trial. Moreover, Dailey's right to an evidentiary hearing was already considered and rejected as procedurally barred in his appeal from the denial of his second postconviction motion. Finally, Dailey has not demonstrated cause for his failure to raise his sentencing claim earlier nor any prejudice.¹²

(9) It is manifest on the face of Dailey's opening brief that the appeal is without merit. The issues raised on appeal are clearly controlled by settled Delaware law. To the extent the issues on appeal implicate the exercise of judicial discretion there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

¹² Del. Super. Ct. Crim. R. 61(i)(3).